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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 420

In the Matter of the Application
of
CHARLES COLACICCO
to vacate a seizure in rem of an automobile.

CHARLES COLACICCO,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully shows to this Honorable Court and alleges:

This petition is for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit to review an order made and entered on the 5th day of June, 1944, affirming an order of the United States District Court for the Southern District of New York made and entered on the 22nd day of December, 1943. Said order

of the District Court dismissed the petition, of Petitioner, to vacate the alleged illegal seizure of his automobile by the Alcohol Tax Unit of the Treasury Department, the administrative forfeiture thereof, and for the return of said automobile to petitioner. The ground for the dismissal was that the Court had no jurisdiction.

Summary Statement of the Matter Involved

Petitioner was arrested on or about the 1st day of June, 1942 upon the charge that he was transporting fuel oil pursuant to a conspiracy, to violate the Internal Revenue Act, in operating a "still" for the illegal manufacture and sale of intoxicating spirits for beverage purposes.

Immediately thereafter, at another location, his automobile, then in a garage in Middletown, New York, was seized by the agents of the Alcohol Tax Unit; thereafter it was appraised at $475 and administratively forfeited. He offered a $250 cost bond, referred to in Section 3724 (c) of the Internal Revenue Code, to the Treasury Department and filed a petition for a remission of the forfeiture, but said petition and a supplemental petition were denied upon the ground that it was not shown satisfactorily that relief under the Statute should be granted and because the claim and cost bond were not filed within the alleged statutory period.

Petitioner thereafter commenced this proceeding in the District Court upon a written petition and notice of motion served upon the United States Attorney for the Southern District of New York, who appeared and argued in opposition. The Court thereupon ordered a hearing, for the presentation and determination of the

questions of fact and law, before him.

On the hearing, the Government appeared and presented evidence of the seizure, the appraisal and the alleged illegal use of the automobile.

Petitioner's counsel cross-examined the Government witnesses. Petitioner and an expert witness testified for petitioner, and both were cross-examined by the United States Attorney.

It clearly appeared by the testimony of the Government appraiser that the appraisal was erroneously based upon an assumption of a non-existent fact, *i. e.*, that the automobile was a bootlegger's car. He admitted that had he known the car was not used by a bootlegger carrying liquor, he would have appraised its value at more than $500.

No testimony as to the publication of the notice required by Section 3724 (b) was presented and it appeared that the Collector did not sell the automobile at public auction as required by Section 3724 (d), nor did he sell it at all. He assigned it for use to a Government Agency under the alleged authority of Title 40, U. S. C. A., Section 304 (h).

The opinion of the District Judge, in spite of the dismissal of the petition upon the specific ground of lack of jurisdiction, contained conclusions upon other features of the matter, such as: (1) the nature of petitioner's actions leading to his arrest; (2) that the publication not testified to will be presumed to have been done, and (3) that the appraisal was sufficient to warrant the Collector in proceeding under Section 3724 to administratively forfeit the automobile.

The order appealed from specifically provided that the basis of the dismissal of the petition was the Court's

lack of jurisdiction.

The opinion of the District Judge dismissing the petition stated it was on the ground that "the Court has no jurisdiction over the officers who made the seizure, or the party who now concededly has the possession of the automobile, nor the property itself, and therefore could not direct the return thereof."

Petitioner, after moving for a rehearing and reconsideration, appealed from the order denying same entered thereon and upon the dismissal of the petition.

It was stipulated that the Record on Appeal be abbreviated by the elmination of all of the testimony excepting that of the Government appraiser.

Petitioner designated as his Points on Appeal the following:

POINT I

The District Court of the United States has jurisdiction over the seized automobile and may compel the return thereof.

POINT II

If the administrative forfeiture proceeding taken herein is exclusive and precludes the United States District Court from taking jurisdiction herein, the applicable sections of the Internal Revenue Code are unconstitutional in that they deprive petitioner of his property without due process of law.

POINT III

The District Court erred in denying petitioner the relief requested or in failing in the alternative to direct the United States attorney to file a libel proceeding against the seized automobile within a stated period of time or return the seized automobile to petitioner.

The Circuit Court of Appeals affirmed the order appealed from, although, as petitioner's counsel understands the opinion, it held, contrary to the conclusion of the District Judge, that the District Court has jurisdiction herein.

Questions Presented

1. Where a petition is dismissed by a District Court upon the ground that the Court has no jurisdiction, are conclusions as to other matters set forth in his opinion valid to the extent that the Circuit Court of Appeals may accept them as binding upon appellant and base its decision in part thereon.

2. Where a respondent interposes no pleading, but contends, upon a hearing ordered by the District Court upon a petition to vacate an alleged illegal seizure and to direct the return of the seized property, that the Court has no jurisdiction in the matter and the Court dismisses the petition upon such ground, may the Circuit Court of Appeals review other conclusions set forth in the opinion of the District Judge, not necessary to the determination made by him that the District Court has no jurisdiction, and affirm the order appealed from on the basis of said review and acceptance of said alleged *obiter dicta* although the said Circuit Court of

Appeals finds that the District Court was in error when it held it had no jurisdiction.

3. Is the instant proceeding one in Admiralty, and if so, did the Circuit Court of Appeals fall into error by not directing proof of the question of the Collector's compliance with the provisions of the Internal Revenue Code in the Administrative Forfeiture proceedings taken by him to forfeit the automobile owned by petitioner?

4. If the instant proceeding is not in Admiralty did the Circuit Court of Appeals, after finding that the District Court had jurisdiction, fall into error by failing to remand the case for further proceedings to determine whether the Collector complied with the provisions of the Internal Revenue Code in the Administrative Forfeiture proceedings taken by him, to forfeit the automobile owned by petitioner?

5. Did the Circuit Court of Appeals fall into error when it assumed that the notice required under Section 3724 (b) of the Internal Revenue Code to appear and claim the car within 30 days was duly published.

6. Did the Circuit Court of Appeals fall into error when it concluded that Colacicco raised no question as to the legality of the seizure.

7. Did the Circuit Court of Appeals fall into error when it concluded that Colacicco raises no question that the automobile was assigned for governmental use instead of selling it at public auction on ten days notice, as required by Section 3724 (d) of the Internal Revenue Code.

8. Did the Circuit Court of Appeals fall into error

when it concluded that the District Judge dismissed the petition because the forfeiture was within the terms of the statute.

9. Do the provisions of Section 3724 of the Internal Revenue Code afford due process of law in spite of the failure to afford an owner of seized property the opportunity to come into Court and contest the claim of the Collector upon the ground that he has not complied with the provisions of said statute, and upon the ground that the Government appraisal was erroneous and invalid?

10. Was the forfeiture of petitioner's automobile a violation of his rights under the Constitution of the United States in that although the property was concededly of the value of more than $500, as appears from the testimony of the Government Appraiser, the learned Courts below upheld the administrative forfeiture under Section 3724 of the Internal Revenue Code instead of vacating same and directing that a Libel be filed against the automobile pursuant to Section 3723 of the Internal Revenue Code.

11. Was the petitioner deprived of his property without due process of law in violation of his rights under the Constitution of the United States by reason of having been prevented from coming into a judicial or quasi-judicial proceeding to defend the claim against his automobile upon the merits and upon the ground that the Collector did not comply with the jurisdictional prerequisites provided by Congress in Sections 3723 and 3724 of the Internal Revenue Code,

Reasons for Granting the Petition

1. The questions presented involve the interpretation of Internal Revenue laws.

2. The questions presented involve the interpretation of laws which deprive a citizen of the remedy of replevin and purports to substitute a remedy in lieu thereof so that he may assert his claims and defend himself and his property against accusations.

3. The questions presented involve the interpretation of laws and the judgments and orders of the United States Courts regarding the remedy and procedure asserted and taken by a citizen, for the purpose of recapturing his property alleged to have been seized and forfeited without warrant or notice or due process by agents of the Government of the United States, and for the purpose of defending himself and his property against the unproven charges of the said agents.

4. The questions presented appear to be novel and do not seem to have ever been decided by this Court.

5. The questions presented involve matters of supreme importance in practcie and procedure on due process, the determination of which, by this Court, may result in the saving of a multiplicity of proceedings in the Courts below and the expenditure of time and labor incident thereto.

Conclusion

It seems clear, from a reading of the opinion of the Circuit Court of Appeals in the instant case, that the District Courts have jurisdiction over petitioner's property seized by the Alcohol Tax Unit and it likewise seems clear that the dismissal of the petition filed by petitioner in the District Court was solely upon the ground that the District Court had no jurisdiction. Nevertheless, as petitioner understands the basis of the disposition of the appeal by the affirmance of the order appealed from, it has been held in effect that the proceedings by the Collector were in compliance with the provisions of Sections 3723 and 3724 of the Internal Revenue Code, although (1) the appraisal was clearly erroneous and (2) no proof of compliance was produced by the Government in answer to the allegations of the petition to the effect that the Collector did not comply with the said provisions.

Petitioner respectfully urges that the situation thus created is an anomoly and as a result thereof he has not been afforded due process of law.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue out of this Court directed to the Circuit Court of Appeals for the Second Circuit pursuant to the authority of Title 28, U. S. Code, Section 347 (a) [Judicial Code, Section 240 (a)] to bring before this Court for review a full and complete transcript of the record of the proceedings herein as contained in the Transcript of the Record filed in the said Circuit Court of Appeals, and that petitioner have such other and further relief as to the Court may seem just

and proper in the premises.

Dated: New York, August 29th, 1944.

Respectfully submitted,

CHARLES COLACICCO,
Petitioner.

State of New York,
City of New York,
County of New York, ss.:

CHARLES COLACICCO, being duly sworn, deposes and says: That he is the Petitioner in the foregoing Petition. That he has read the Petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

CHARLES COLACICCO.

Sworn to before me this
29th day of August, 1944.

MARION S. WILCOX,
Notary Public, Queens County.
Queens Co. Clk's No. 4106, Reg. No. 225W
Certificate filed in
N. Y. Co. Clk's No. 999, Reg. No. 569-W-5
Commission expires March 30, 1945.

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—against—

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of Hon. George Murray Hulbert, District Judge is unreported. in 143 F (2d) 410.

The opinion of the Circuit Court of Appeals for the Second Circuit is unreported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, Title 28, U. S. Code, Section 347 (a).

Statutes Involved

Internal Revenue Code, Title 26, U. S. Code, Section 3723:

> Judicial Proceedings to Enforce Forfeiture—
>
> (a) Nature and Venue.
>
> The proceedings to enforce such forfeiture shall be in the nature of a proceeding in rem in the district court of the United States for the district where such seizure is made.

Internal Revenue Code, Title 26, U. S. Code, Section 3724:

> Goods Valued at $500 or Less.
>
> In all cases of seizure of any goods, wares, or merchandise as being subject to forfeiture under any provision of the internal revenue laws which, in the opinion of the collector or deputy collector making the seizure, are of the appraised value of $500 or less, the said collector or deputy collector shall, except in cases otherwise provided, proceed as follows:
>
> (a) List and Appraisement.
>
> He shall cause a list containing a particular description of the goods, wares, or merchandise seized to be prepared in duplicate, and an appraisement thereof to be made by three sworn

appraisers, to be selected by him, who shall be respectable and disinterested citizens of the United States residing within the collection district wherein the seizure was made. Said list and appraisement shall be properly attested by the said collector or deputy collector and the said appraisers, for which service each of the said appraisers shall be allowed the sum of $1.50 a day, to be paid in the manner provided by law for other necessary charges of collectors.

(b) Notice of Seizure.

If the said goods are found by the said appraisers to be of the value of $500 or less, the said collector or deputy collector shall publish a notice, for three weeks, in some newspaper of the district where the seizure was made, describing the articles, and stating the time, place, and cause of their seizure, and requiring any person claiming them to appear and make such claim within thirty days from the date of the first publication of such notice.

(c) Execution of Bond by Claimant.

Any person claiming the goods, wares, or merchandise so seized, within the time specified in the notice, may file with the said collector or deputy collector a claim, stating his interest in the articles seized, and may execute a bond to the United States in the penal sum of $250, with sureties to be approved by the said collector or deputy collector, conditioned that, in case of condemnation of the articles so seized, the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon the delivery of such

bond to the collector or deputy collector, he shall transmit the same, with the duplicate list or description of the goods seized, to the United States district attorney for the district, and said attorney shall proceed thereon in the ordinary manner prescribed by law.

(d) SALE IN ABSENCE OF BOND.

If no claim is interposed and no bond is given within the time above specified, the collector or deputy collector, as the case may be, shall give ten days' notice of the sale of the goods, wares, or merchandise by publication, and, at the time and place specified in the notice, shall sell the articles so seized at public auction.

(e) DEPOSIT OF PROCEEDS OF SALE.

After deducting the expenses of appraisement and sale, the collector or deputy collector, as the case may be, shall deposit the proceeds to the credit of the Secretary.

(f) REMISSION OF FORFEITURE—(1) CLAIM.

Within one year after the sale of any goods, wares, or merchandise, as provided in the preceding subsections, any person claiming to be interested in the property sold, may apply to the Secretary for a remission of the forfeiture thereof, or of any part thereof, and a restoration of the proceeds of the sale.

(2) ALLOWANCE.

The Secretary may grant the same upon satisfactory proof, to be furnished in such manner as

he shall prescribe: PROVIDED, That it shall be satisfactorily shown—

(A) That the applicant, at the time of the seizure and sale of the said property, and during the intervening time, was absent, out of the United States, or in such circumstances as prevented him from knowing of the seizure, and that he did not know of the same; and also

(B) That the said forfeiture was incurred without willful negligence or any intention of fraud on the part of the owner of said property.

(g) DISTRIBUTION OF PROCEEDS OF SALE.

If no application for restoration of the proceeds is made within one year, as prescribed in the foregoing subsection, the Secretary shall, at the expiration of the said time, cause the proceeds of the sale of the said property to be distributed according to law, as in the case of goods, wares, or merchandise condemned and sold pursuant to the decree of a competent court. (53 Stat. 458.)

Title 40, U. S. Code, Section 304 (h):

DISPOSITION OF PROPERTY FORFEITED TO UNITED STATES.

In the event that any property seized by any agency is or has been forfeited to the United States otherwise than by court decree, it may, in the event that the property is not ordered by competent authority to be returned to any claimant, and in lieu of being disposed of as otherwise provided by law (including advertisement for sale, and sale), be retained by such agency and devoted

to official use only. If such agency shall not desire so to retain such property, the head thereof shall forthwith notify the Director to that effect, and such property shall—

(a) In the event that it is not ordered by competent authority to be returned to any claimant, and in lieu of being disposed of as otherwise provided by law (including advertisement for sale, and sale), be delivered by such agency, upon order of the Director given within a reasonable time, to any other agency which requests and in the judgment of the Director should be given the property, or

(b) upon order of the Director given within a reasonable time, be disposed of as otherwise provided by law. (Aug. 27, 1935, ch. 740, §303, 49 Stat. 879.)

Title 28, U. S. Code, Section 747:

"All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

Cases Cited

In re Behrens, 39 Fed. (2d) 561;

Goldman v. *American Dealers Service, Inc.*, 49 Fed. Supp. 933, aff'd 135 Fed. (2d) 398;

Dobbins Distillery v. *U. S.*, 96 U. S. 395;

Fishburn v. *Jackson*, 55 Fed. (2d) 934;

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Milkint, et al. v. *Morgenthau*, 92 Fed. (2d) 266;

The Schooner "Anne", 9 Cranch 289;

U. S. v. *Chichelli*, 10 Fed. Supp. 900.

Specifications of Errors

The learned Circuit Court of Appeals erred in holding:

1. That the notice required under Section 3724 (b) Internal Revenue Code, to appear and claim the car within thirty days was duly published.

2. That petitioner did not raise any question that the automobile was assigned for government use instead of selling it at public auction on ten days' notice, as required by Section 3724 (d), Internal Revenue Code.

3. That petitioner raises no question as to the legality of the seizure.

4. That the District Judge dismissed the petition because the forfeiture was within the terms of the statute.

5. In effect that the appraisal made could not be attacked and irrespective of the actual value of the property was sufficient to warrant the Collector in proceeding to forfeit the property under the provisions of Section 3724 of the Internal Revenue Code.

6. That the administrative forfeiture was valid and unassailable by reason of the failure of petitioner to file the $250 cost bond required by Section 3724 (c) and file a claim within the time limited by said statute.

Statement

Under the heading "*Summary Statement*" hereinabove an outline of the facts and proceedings are set forth up to the affirmance of the order of the District Court. After said affirmance petitioner filed a Petition for Rehearing and leave to submit further evidence.

Petitioner requested leave to submit further evidence upon the theory that this proceeding is one in Admiralty. In view of the fact that the Circuit Court of Appeals specifically held, in its opinion, that the District Court has jurisdiction and in view of the fact that the issue in the District Court was confined to the sole question of jurisdiction by reason of the basis stated by District Court for the dismissal of the petition therein, petitioner contended that the Circuit Court of Appeals should have directed that evidence on the question of the compliance by the Collector with the provisions of Section 3724 of the Internal Revenue Code be submitted and that upon said evidence that question be decided and if it were determined that he did not comply that the order appealed from be reversed and the administrative forfeiture be vacated. The reasoning advanced by petitioner for the granting of said requested relief was that the United States Attorney did not file any pleading and in view of that fact, in conjunction with the fact that the decision of the District Court rested solely upon its conclusion that it had no jurisdiction, the matter before the Circuit Court of Appeals was the same

as though it were a decision upon a motion made by the United States Attorney to dismiss the petition on the ground that the District Court has no jurisdiction. The petition for rehearing was denied.

ARGUMENT

The difference of opinion which brings this case to this Court seems to stem from the creation of an anomolous situation in that the basic contention of petitioner was upheld by the Circuit Court of Appeals, contrary to the view of the District Court, but nevertheless he apparently is denied the relief which would seem to be entitled to as a natural result of the finding by the Circuit Court that the District Court had jurisdiction.

Counsel is aware of the fact that the opinion of the Circuit Court of Appeals indicates that the issues, for a decision on which petitioner prayed the District Court, were in fact decided. The issues presented by petitioner were the illegality of the seizure, the non-compliance by the Collector with the provisions of the Internal Revenue Code, (Sections 3723 and 3724) and the contention that if said Section 3724 precluded the District Court from taking jurisdiction because of the failure of petioner to file a claim and post a bond of $250 within the time limited by said statute, then and in that event, the said statute was unconstitutional in that it deprived petitioner of his property without due process of law.

There can be no dispute about the fact that the dismissal of the petition in the District Court was predicated solely upon the conclusion that the District Court had no jurisdiction. The opinion of the District Court and order entered upon said dismissal and appealed from so stated specifically.

It is true that the District Judge, in his opinion, stated certain conclusions, but, in view of the expressed basis of the dismissal, it is respectfully submitted that said conclusions were *obiter dicta* and should not have been considered by the Circuit Court of Appeals.

The Transcript of Record agreed upon and presented to the Circuit Court of Appeals consisted of the testimony of the Government appraiser, the opinion of the Court and the petition, besides the usual procedural papers, and the points of appellant were directed to the question of jurisdiction presented by the decision of the District Court. Appellant did not make a point of the non-compliance by the Collector with the provisions of Sections 3723 and 3724 of the Internal Revenue Code, but the Record and Brief both referred to the contention of petitioner to that effect. Appellant did not make a point of the illegality of the seizure or the admitted erroneous valuation placed upon the automobile by the Government appraiser, but the Record and Brief both referred to the contention of petitioner to that effect.

Appellant certainly did not concede that the procedure followed by the Collector was sufficient under the law, nor did he concede that the seizure was legal or justified.

The testimony presented by the Government did not show compliance with the statutes in question.

It is respectfully submitted that petitioner did raise the question of non-compliance and illegality of seizure, even though specific points were not set forth concerning them, by the presentation of the matter in the Record and Brief. Since the decision appealed from was predicted upon the conclusion that the District Court had no jurisdiction, there was no reason to stress points that might only be important if jurisdiction existed.

The argument and brief of Appellee in the District Court and Circuit Court of Appeals was directed to the alleged lack of jurisdiction on the part of the District Court and the contention that the proceeding under Section 3723 was exclusive and the forfeiture thereunder precluded the Court from taking jurisdiction. The cases cited and relied upon by Appellee were decided upon the theory that the administrative forfeiture was exclusive and precluded the District Court from taking jurisdiction. The decision of the Circuit Court of Appeals herein, however, held that the District Court did have jurisdiction under Title 28, U. S. Code, Section 747. Therein lies the inexplicable anomoly. Inexplicable, at any rate, to counsel for petitioner herein.

If the conclusions or presumptions indulged in by the District Court, as to compliance and illegality, could be construed as being material in any sense so as to permit their adoption by the Circuit Court of Appeals as a basis for its affirmance, then, it is respectfully submitted that the learned Circuit Court of Appeals, as well as the District Court, erred. The point made herein is not that those conclusions are contrary to the weight of evidence, but, rather, that there is no evidence upon which those conclusions can be based.

It is respectfully submitted that this proceeding is one in Admiralty.

If counsel is correct in that contention both the Circuit Court of Appeals and this Court have the right to call for additional evidence.

The essential characteristic and the ultimate result sought to be accomplished by the provisions of the Constitution guaranteeing due process is that technicalities shall not be sufficient to constitute a bar to the preservation of elementary and fundamental rights. The

right to be secure in one's person and property is the fundamental right herein involved.

As the situation now stands petitioner's property was seized without warrant upon a charge that it was used in violation of the Internal Revenue Laws, but the fact is and still remains that he has been deprived of the right to come into court or before a judicial or quasi-judicial body to defend his property on the merits. His property has been forfeited although the forfeiture was not in compliance with the statutes in such cases made and provided. Certainly the arbitrary and baseless erroneous appraisal cannot be considered sacrosanct to the point where, once it has been shown to be erroneous without question, a person is nevertheless deprived of his rights guaranteed by the Constitution and provided for in Section 3723 of the Internal Revenue Code.

The assumption by the learned Courts below, of compliance with the procedural requirements of Section 3724 has absolutely no basis, unless counsel's construction of the law is completely erroneous. Surely, the forfeiture of property, without a trial on the merits, is repugnant to the nth degree. Can it be said that a presumption of compliance, if indeed there can be any such thing as to the prerequisites to an ex-parte forfeiture proceeding, satisfies the requirements of due process in a case such as this? We cannot believe that to be the law.

CONCLUSION

It is respectfully submitted that the decision of the Circuit Court of Appeals is incorrect. The result reached by the Courts below should be met with an authoritative disapproval. A question of general importance is involved. The petition should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 420

CHARLES COLACICCO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 32–34) is reported at 143 F. (2d) 410. The opinion of the district court (R. 14–20) is reported at 55 F. Supp. 766.

JURISDICTION

The judgment of the circuit court of appeals was entered June 5, 1944 (R. 35–36). The petition for a writ of certiorari was filed September 1, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The district court dismissed a petition to vacate an administrative forfeiture under Section 3724 of the Internal Revenue Code on the ground that, since the forfeiture was effected in conformity with law, it had no jurisdiction. On appeal the order was affirmed as against the contention that Section 3724 is unconstitutional. Petitioner contends that the circuit court of appeals held that the district court did have jurisdiction over the res and that the circuit court of appeals affirmed the order on the assumption that the administrative proceedings were regular, thus basing its decision on facts outside the record. The question presented is whether the opinion of the circuit court of appeals is susceptible of the construction contended for by petitioner and, hence, whether the case should be remanded to the circuit court of appeals to take the steps necessary to a determination of the issues concerning the regularity of the administrative forfeiture.

STATUTES INVOLVED

The applicable statutory provisions are set forth in the Appendix, *infra,* pp. 14–17.

STATEMENT

On or about May 11, 1943, petitioner filed in the District Court for the Southern District of New York a petition seeking an order vacating the seizure and subsequent forfeiture of his automobile by the Treasury Department and directing

its return to petitioner (R. 4–7). The petition was brought on for hearing upon a notice of motion addressed to the United States Attorney (R. 3–4). The petition alleged that the seizure had been made on June 1, 1942, because it had been claimed that the automobile had been used for the transportation of fuel oil in furtherance of a violation of the Internal Revenue Laws[1] (R. 5); that the automobile had been subsequently appraised, at the instance of the Treasury Department, at $475 and was administratively forfeited because no claim and cost bond had been filed by petitioner within the period of time claimed by the Treasury Department to be the limit for such filing in cases where the value of the seized property is $500 or less (R. 5); that the automobile was not sold at public auction as required under Section 3724 (d) of the Internal Revenue Code, but was retained for official use by the Alcohol Tax Unit (R. 5); that petitioner's applications to the Treasury Department for remission of the forfeiture were denied and the Department refused to accept a cost bond tendered by petitioner because the Department ruled that no satisfactory showing for relief had been made and that the claim and cost bond had not been filed within the statutory period (R. 5–6). The petition further alleged that the automobile had not been used in violation of the Internal Revenue Laws; that its value when seized

[1] The oil was apparently used in connection with the operation of an illicit still (R. 15).

was more than $500 and the appraisal at a lesser value was erroneous; that the administrative forfeiture was not in accordance with law and deprived petitioner of his right to a judicial determination of whether the automobile had been used in violation of law, thus resulting in the taking of property without due process (R. 6–7).

The United States Attorney appeared in opposition to the petition, and after hearing counsel, the district court directed that a hearing be had for presentation and determination of the questions of fact and law presented (R. 8–9). At the hearing both the United States Attorney and petitioner introduced evidence (R. 23), the only portion of which appearing in the record is the testimony of one of the government appraisers as to the valuation of the automobile (R. 10–13). On October 18, 1943, the district court rendered an opinion dismissing the petition (R. 14–20), and thereafter entered an order of dismissal based on the ground that it had no jurisdiction to vacate the seizure of the automobile and direct its return (R. 23–24). The order also denied petitioner's motion for rehearing and reconsideration, in which he requested as alternative relief that the United States Attorney be directed to proceed with the filing of a libel or to abandon the seizure and return the automobile to petitioner (R. 21–22). On appeal to the circuit court of appeals the order of the district court was affirmed (R.

35–36). The circuit court of appeals stated that the only question presented on the appeal was whether it was a denial of due process of law to the owner of property appraised at less than $500 to require the bond specified in Section 3724 (c) (Appendix, *infra,* p. 15) where he is able to post one (R. 33), and held that the requirement did not make the section unconstitutional (R. 33–34).

ARGUMENT

The gist of petitioner's argument, as we understand it, is as follows: Before the district court the issues were (1) whether the automobile had been used in violation of law so as to justify its seizure, (2) whether there had been compliance with the provisions of Sections 3723 and 3724 of the Internal Revenue Code so as to validate the forfeiture, and (3) whether petitioner's failure to file a claim to the automobile and post a bond, as required by Section 3724 (b) and (c), precluded the court from taking jurisdiction of the instant proceeding (Pet. 19). The dismissal by the district court was predicated solely upon lack of jurisdiction (Pet. 18, 19). Its conclusions with respect to the legality of the seizure and compliance with the provisions of Section 3724 did not relate to the issue of jurisdiction and, hence, were *obiter dicta* (Pet. 20). On appeal petitioner's argument was directed only to the jurisdictional question (Pet. 20–21). The circuit court of appeals, however, held that the district court

did have jurisdiction under 28 U. S. C. 747 (Appendix, *infra,* pp. 16–17), and thus threw open for determination the issues as to the regularity of the forfeiture (Pet. 21). Since there was no evidence in the record upon which these issues could be resolved (Pet. 21), the circuit court of appeals erred in affirming the order dismissing the cause for lack of jurisdiction and in failing to direct that the necessary evidence be introduced (Pet. 21–22).

The argument is unsound because it is founded upon petitioner's misconception of the nature of the proceedings in the district court and the basis for the dismissal by that court, and his misconstruction of the opinion of the circuit court of appeals.

Petitioner apparently bases his contention that the district court had jurisdiction on those cases which have held that by virtue of the provisions of 28 U. S. C. 747 (Appendix, *infra,* pp. 16–17), the property is in *custodia legis* from the time of the seizure, and that the owner thereof may move in the district court to compel the custodian of the property to institute forfeiture proceedings; if he fails to proceed within the time set, he must return the goods (*Goldman* v. *American Dealers Service, Inc.,* 135 F. (2d) 398, 401 (C. C. A. 2); *In re No. 32 East Sixty-Seventh Street,* 96 F. (2d) 153, 156 (C. C. A. 2); *In re Behrens,* 39 F. (2d) 561 (C. C. A. 2)). However, where the appraised value of the seized

property is less than $500, the proceedings for forfeiture are controlled by Section 3724 (Appendix *infra*, pp. 14–16), and the method there prescribed is exclusive (*Milkint* v. *Morgenthau*, 92 F. (2d) 266 (C. C. A. 4); *Fisburn* v. *Jackson*, 55 F. (2d) 934, 936 (N. D. Tex.); *United States* v. *Chicelli*, 10 F. Supp. 900 (W. D. N. Y.)). That method of procedure is administrative; but if a claimant of the seized property files the bond specified in Section 3724 (c), the proceeding for forfeiture is in the "ordinary manner prescribed by law." When an administrative forfeiture of property pursuant to Section 3724 is complete, it is in legal effect and operation equivalent to a sale under a judicial decree. Cf. *In re Commercial Inv. Trust Corp.*, 31 F. (2d) 494, 495 (W. D. N. Y.); *McGuire* v. *Winslow*, 26 Fed. 304, 307 (N. D. N. Y.).

Since it is fundamental that, before there can be a judicial proceeding in rem, there must be a res to proceed against (*The Brig "Ann,"* 9 Cranch 289), the basic issue before the district court was whether the proceedings taken under Section 3724 to forfeit petitioner's property had effectively transferred title to the automobile and thus removed the res from the jurisdiction of the court.

Petitioner sought relief in the district court on the alleged grounds that the automobile had not been sold at public auction as required under Section 3724 (d); that it had not been used in viola-

tion of law; that the appraisal of its value at less than $500 was erroneous; and that the administrative forfeiture was not in accordance with law (R. 5–7). These were the subjects of the district court's opinion. As to petitioner's first contention, which apparently he did not strongly press, the court pointed out that the disposition of the automobile had been made "by assignment of its use for governmental purposes in accordance with the provisions of Title 40, U. S. C. A., Sec. 304h" (Appendix, *infra*, p. 17) (R. 18). As to the contention that the automobile had not been used in violation of law, the court said that the question of petitioner's "guilt or innocence is not the subject matter of this proceeding, but there was reasonable probable cause for the Alcohol Tax Unit of the Treasury Department to have seized the automobile" (R. 19). The court also held that the correctness of the appraisal could not be the basis for judicial review since "the intent of the statute must be considered as a guide and protection to the Collector; he could not very well base his action on a speculative value when the Congress provided for two distinct methods of procedure" (R. 18). Having already found that the appraisal required by Section 3724 (a) had been made and the appraisers had determined the value of the automobile to be $475 (R. 16), the court stated that the proceedings taken after the seizure "appear to have been regular" (R. 19); that pre-

sumptively the notice required by Section 3724 (b) had been published (R. 16); that petitioner did not make any claim or file the bond required by Section 3724 (c) (R. 17); and that his application for remission of the forfeiture had been denied by the Treasury Department (R. 17). There is nothing to indicate that petitioner attacked the forfeiture on the ground that the required notice had not been published. Accordingly, the district court properly assumed that the required notice had been published. Cf. *United States* v. *Crusell,* 81 U. S. 1; *Hammond* v. *Hull,* 131 F. (2d) 23, 25 (App. D. C.), certiorari denied, 318 U. S. 777; *Dunn* v. *Ickes,* 115 F. (2d) 36, 37 (App. D. C.), certiorari denied, 311 U. S. 698.[2]

The balance of the opinion after the statement that the proceedings were regular, is devoted to a discussion of the case of *United States* v. *Specified Quantities of Intoxicating Liquors,* 7 F. (2d) 835 (C. C. A. 2), upon which petitioner relied (R. 19). The court explained that the case was not applicable because there "the court had jurisdiction of the subject matter and of the public official who, presumptively, at least, had possession of and could be directed to return the subject of the seizure" (R. 20), whereas "In this proceeding the Court has no jurisdiction over the officers who

[2] We are advised by the Treasury Department that in fact a notice had been published in the Newburgh (New York) News on June 16, 23, and 30, 1942.

made the seizure, or the party who now concededly has the possession of the automobile, nor the property itself, and therefore could not direct the return thereof. Cf. *Goldman* v. *American Dealers Service, Inc.,* 49 F. Supp. 993, aff'd, 135 Fed. (2d) 398" (R. 20). As characterized by the circuit court of appeals, the district court dismissed the petition because "the forfeiture was within the terms of the statute" (R. 33). Clearly, the conclusions of the district court bearing on the legality of the seizure and compliance with the provisions of Section 3724 were not, as contended by petitioner, *obiter dicta.* The court found that petitioner had not sustained his contentions and that the administrative proceedings had effectively removed the res from the court's jurisdiction.

As appears from the designation of his Points on Appeal (R. 28–29, Pet. 6–7), petitioner predicated his appeal to the circuit court of appeals on the contention that if Section 3724 precluded the district court from taking jurisdiction it was unconstitutional. Petitioner's theory was that the filing of a bond could not constitutionally be a prerequisite to the court's jurisdiction of the forfeiture proceedings and therefore the property was still in *custodia legis* under 28 U. S. C. 747.[3]

[3] At page 4 of his brief in the circuit court of appeals, a copy of which has been lodged with the Clerk, petitioner stated, in referring to the dismissal by the district court upon the ground of lack of jurisdiction:

"The opinion of the District Court makes it clear that the merits were not considered, since the decision, dismissing the

Since petitioner did not argue that the forfeiture proceedings were invalid in other respects, the circuit court of appeals was clearly justified in stating that petitioner "raises no question as to the legality of the seizure, or that the car was assigned to government use after its forfeiture, instead of being sold" (R. 32), and that the only question was whether "§ 3724 (c) of Title 26 is unconstitutional in requiring him to post a bond in the sum of $250 to secure the costs and expenses of any proceedings to condemn the car, as a con-

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petition and denying the motion for a rehearing, rested upon the finding that the Court had no jurisdiction.

"Although the opinion does not point out why in the instant case the relief was denied, the reason can only be that an administrative forfeiture had already taken place herein under the aforementioned section of the Internal Revenue Code [Section 3724]. The only theory upon which such a conclusion can rest is that the Court believed that the administrative forfeiture was exclusive and precluded the District Court from taking jurisdiction and compelling the filing of a libel because petitioner did not file the $250 cost bond which the said section seems to make a prerequisite to commencing proceedings to libel the property seized without the direction of a Court.

"The question then presented to this Court is whether the said Internal Revenue Code section is exclusive and precludes this Court from taking jurisdiction where the cost bond is not filed."

He argued that he was entitled to the relief granted in *In re Behrens*, 39 F. (2d) 561 (C. C. A. 2), and *Goldman* v. *American Dealers Service, Inc.*, 135 F. (2d) 398 (C. C. A. 2), "unless, of course, it is held that Section 3724 of the I. R. C. is constitutional and that it precludes the District Court from taking jurisdiction" (p. 11).

dition upon his right to contest the propriety of the seizure" (R. 32–33).[4]

Hence, when the circuit court of appeals decided that the requirement for the posting of a bond is constitutional, it disposed of the only ground urged by petitioner as the basis for jurisdiction in the district court, and therefore held that the district court did not have jurisdiction. There is thus no warrant for petitioner's contention (Pet. 19, 21) that the circuit court of appeals decided that the district court did have jurisdiction, and no warrant for his assertion that the circuit court of appeals based its decision on facts outside the record.

In essence, petitioner's complaint is that he was deprived of a judicial determination of the issue whether his automobile was subject to be forfeited. However, since he did not avail himself of the remedy provided by the statute whereby he could have secured such a determination and has made no showing that he was unable to post the required bond, he has no standing now to contest the validity of the completed forfeiture (*Milkint* v. *Morgenthau,* 92 F. (2d) 266, 267 (C. C. A. 4), and cases cited).

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[4] Incidental to his argument on the constitutionality of the statute, petitioner did mention his contention that the appraisal was erroneous, but he did not argue the point.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1944.

APPENDIX

Sections 3723 and 3724 of the Internal Revenue Code (26 U. S. C. 3723, 3724) provide in pertinent part as follows:

> SECTION 3723. (a) The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the district court of the United States for the district where such seizure is made.
>
> * * * * *
>
> SECTION 3724. In all cases of seizure of any goods, wares, or merchandise as being subject to forfeiture under any provision of the internal revenue laws which, in the opinion of the collector or deputy collector making the seizure, are of the appraised value of $500 or less, the said collector or deputy collector shall, except in cases otherwise provided, proceed as follows:
>
> (a) He shall cause a list containing a particular description of the goods, wares, or merchandise seized to be prepared in duplicate, and an appraisement thereof to be made by three sworn appraisers, to be selected by him, who shall be respectable and disinterested citizens of the United States residing within the collection district wherein the seizure was made. Said list and appraisement shall be properly attested by the said collector or deputy collector and the said appraisers, for which service each of the said appraisers shall be allowed the sum of $1.50 a day, to be paid in the manner provided by law for other necessary charges of collectors.

(b) If the said goods are found by the said appraisers to be of the value of $500 or less, the said collector or deputy collector shall publish a notice, for three weeks, in some newspaper of the district where the seizure was made, describing the articles, and stating the time, place, and cause of their seizure, and requiring any person claiming them to appear and make such claim within thirty days from the date of the first publication of such notice.

(c) Any person claiming the goods, wares, or merchandise so seized, within the time specified in the notice, may file with the said collector or deputy collector a claim, stating his interest in the articles seized, and may execute a bond to the United States in the penal sum of $250, with sureties to be approved by the said collector or deputy collector, conditioned that, in case of condemnation of the articles so seized, the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon the delivery of such bond to the collector or deputy collector, he shall transmit the same, with the duplicate list or description of the goods seized, to the United States district attorney for the district, and said attorney shall proceed thereon in the ordinary manner prescribed by law.

(d) If no claim is interposed and no bond is given within the time above specified, the collector or deputy collector, as the case may be, shall give ten days' notice of the sale of the goods, wares, or merchandise by publication, and, at the time and place specified in the notice, shall sell the articles so seized at public auction.

(e) After deducting the expenses of appraisement and sale, the collector or deputy collector, as the case may be, shall deposit the proceeds to the credit of the Secretary.

(f) Within one year after the sale of any goods, wares, or merchandise, as provided in the preceding subsections, any person claiming to be interested in the property sold, may apply to the Secretary for a remission of the forfeiture thereof, or of any part thereof, and a restoration of the proceeds of the sale.

2. The Secretary may grant the same upon satisfactory proof, to be furnished in such manner as he shall prescribe: *Provided,* That it shall be satisfactorily shown—

(A) That the applicant, at the time of the seizure and sale of the said property, and during the intervening time, was absent, out of the United States, or in such circumstances as prevented him from knowing of the seizure, and that he did not know of the same; and also

(B) That the said forfeiture was incurred without willful negligence or any intention of fraud on the part of the owner of said property.

(g) If no application for restoration of the proceeds is made within one year, as prescribed in the foregoing subsection, the Secretary shall, at the expiration of the said time, cause the proceeds of the sale of the said property to be distributed according to law, as in the case of goods, wares, or merchandise condemned and sold pursuant to the decree of a competent court.

28 U. S. C. 747 (section 934 of the Revised Statutes) provides as follows:

> All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

40 U. S. C. 304h (Act of Aug. 27, 1935, c. 740, sec. 303, 49 Stat. 879) in pertinent part provides:

> In the event that any property seized by any agency is or has been forfeited to the United States otherwise than by court decree, it may, in the event that the property is not ordered by competent authority to be returned to any claimant, and in lieu of being disposed of as otherwise provided by law (including advertisement for sale, and sale), be retained by such agency and devoted to official use only.

U. S. GOVERNMENT PRINTING OFFICE: 1944